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SUPREME COURT OF THE UNITED STATES

Term

No. 174

JOSE EDUARDO CASALDUC, Trustee,
PETITIONER

vs.

ANTONIO DIAZ GONZALEZ ET AL.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT WITH SUPPORTING BRIEF

BENICIO F. SANCHEZ
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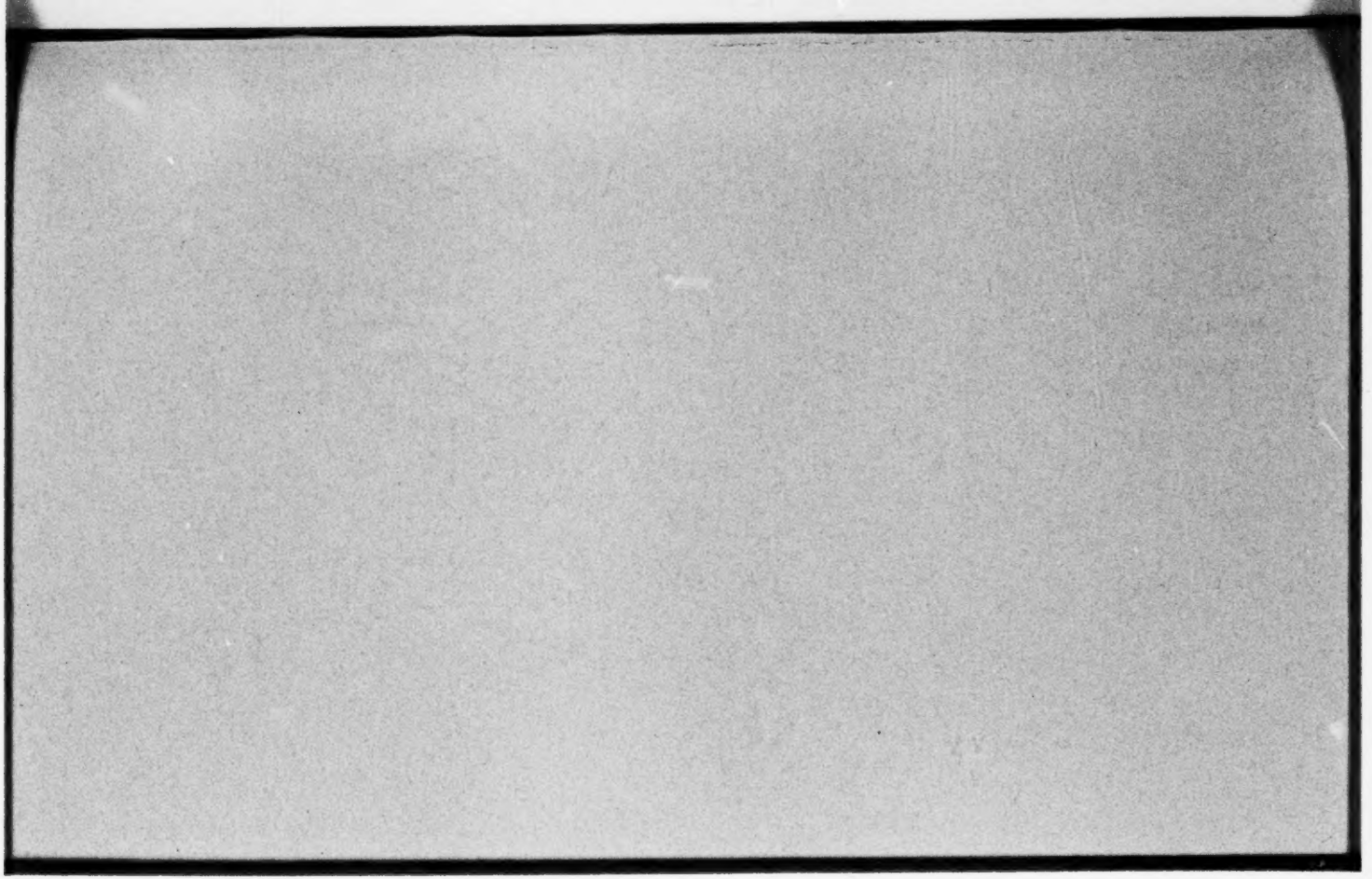

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TABLE OF CASES CITED

	Page
Alaska Packer vs. Pillsbury, 301 U.S. 174	14
Altman vs. National Life Assurance, 37 Fed. Sup. 414	16
Cotton Planter, 1 Paine, 23 Fed. Case 3270	16
Derosia vs. Winona, 18 Minn. 133	13
Ginnochio vs. Hydraulic Press, 266 Fed. 564	11
Godchaux vs. Leon Boudreaux, 96 So. 582	12
Gubelman, In Re, 10 Fed. (2) 926	12
Gypsy Oil Co. vs. Escoe, 275 U.S. 498	7
Hoyt vs. Stark, 66 Pac. 223	11-12-19
José Eduardo Casalduc, Trustee vs. Antonio Díaz González, 117 Fed. (2) 915	6
Inhabitants of Town of Greenfield vs. Burnham, 145 N.E. 308	12
Lewis Hall Iron Works vs. Blair, 23 Fed. (2) 972	11-17
López vs. Cortéz, 35 P.R. Reports 577	10-13
Mutual Life vs. Phinney, 178 U.S. 327	4-17-19-21-22
Randall vs. Foglesong, 200 Fed. 741	11
State vs. Bruno, 21 So. 30	16
U. S. vs. Curran, 299 Fed. 946	14
U. S. vs. Lombardo, 241 U.S. 73	4-11-12-17-18
U. S. vs. Richard & Co., 12 Court of Customs, 2880	12
W. J. White Co. vs. Winton 41 Cal. App. 693 (183 Pac. 277)	11-18
Washington Southern vs. Baltimore, 263 U.S. 629	14
Washington, The, 16 Fed. (2) 206	17

OTHER CITATIONS

Advisory Committee's Note on Rule 83	16
Bouvier Law Dictionary, Vol. 3 p. 313	16

STATUTE AND RULES

	Page
Act of June 22, 1938, Sect. 1 (52 Stat. 855, 11 U.S.C.A. 48A)	2-3-7-9-15
Federal Rule of Civil Procedure 6A	2-4-7-9-10-15
Federal Rule of Civil Procedure 73A	2-4-8-11-15
Federal Rule of Civil Procedure 77A	2-4-8-12-15
Federal Rule of Civil Procedure 77C	2-4-8-12-15-18
Federal Rule of Civil Procedure 83	2-4-5-8-14-15
District Court Rule 41	2-4-9-14-15

TABLE OF CONTENTS

Petition for Writ of Certiorari	1
I. Statement of Matter Involved	1
II. Reasons Relied Upon for Allowance of Writ	3
III. Importance of Granting the Writ	5
Certificate of Good Faith	6
Brief in Support of Petition	6
Statement	6
Opinions of the Courts Below	6
Jurisdiction of This Court	7
Specification of Errors	7
Statute and Rules Involved	7
Argument	9
A. Violation of Sect. 1 of Act of June 22, 1938 (52 Stat. 855,11 U.S.C.A. 48 A)	9
B. Violation of Federal Rule of Civil Procedure 6A	9
C. Violation of Federal Rule of Civil Procedure 73 A	11
D. Violation of Federal Rule of Civil Procedure 77 A	12

E. Violation of Federal Rule of Civil Procedure 77 C ---------- 12
F. Violation of Federal Rule of Civil Procedure 83 ---------- ---------- 14
1. Rule 41 of the District Court inconsistent ---------- 14
2. Rule 41 of the Dictrict Court not notified and copy thereof sent to Supreme Court ---------- ---------- ------ 15
G. "filing" defined and interpreted in contradiction to Supreme Court cases of U. S. vs. Lombardo, 241 U. S. 73, and Mutual Life vs. Phinney, 178 U. S. 327 ---------- 17
Conclusion ---------- 21

Appendix

Exhibit A ---------- 23
Exhibit B ---------- 23
Exhibit C ---------- 24
Clerks' Certificate ---------- 25

SUPREME COURT OF THE UNITED STATES

Term

José Eduardo Casalduc,
Trustee in Bankruptcy, Petitioner

vs.

Antonio Díaz González, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and
Associate Justices of the Supreme
Court of the United States:

Your petitioner, José Eduardo Casalduc, Trustee in Bankruptcy, respectfully shows:

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit to review a judgment made and entered in the said Circuit Court of Appeals on February 18, 1941 (Record page 48), by which judgment an appeal from the United States District Court of Puerto Rico was dismissed for lack of jurisdiction, and as to which judgment the said Circuit Court of Appeals entertained a motion for rehearing and denied same on March 20, 1941 (R. p. 51). Mandate was issued by the Circuit Court to the District Court on April 8, 1941 (R. p. 51).

I

STATEMENT OF MATTER INVOLVED

This petition involves the violation of section 1

of the Act of June 22, 1938 (52 Stat. 855, 11 U.S.C.A. 48 A) regarding the period of time that an appellant may have for appeal from a United States District Court to a Court of Appeals in a bankruptcy matter.

It also involves the violation of Federal Rules of Civil Procedure 6A, 73A, 77A, 77C, and 83, by sustaining Rule 41 of the Old Rules of the United States District Court of Puerto Rico.

The United States District Court for Puerto Rico through the Honorable Robert H. Cooper denied the right of José Eduardo Casalduc, Trustee in this bankruptcy matter before the said Court, to "pierce the corporate veil" and to seize the property of Antonio Díaz González, a non resident alien (R. p. 2), and make him liable in a summary way for the debts and liabilities of the said bankrupt estate, amounting to over $100,000.00 (R. p. 16), he having filed a claim against it. (R. p. 12). The Trustee herein, filed a motion for reconsideration before the said District Court on September 14, 1940 (R. p. 11), which was denied on September 17, 1940 (R. p. 30). However, the period of appeal from the order of August 5 was due on September 14, 1940 (R. p. 48), on which day, a Saturday afternoon, between the hours of two and four p. m., attorney for the Trustee went to the Clerk's office of the United States District Court for Puerto Rico to file the motion of appeal in this matter. The said office being closed, attorney for the Trustee made a note on the back of said notice, reading: "Deposited Sept. 14, 1940 between 2:00 and 4:00 p.m. (signed) H. M. B." (R. p. 47), and slipped it under the door of the said clerk's office (R. p. 47 Ex. D, and p. 48). Early next Monday morning, September 16, attorney for the Trustee went to the clerk's office to inquire about the said notice of appeal that had been lodged in the clerk's office on September 14, and the clerk stated to him that the said notice of appeal had not been found. Thereupon, attorney for the Trustee made a

new undated notice of appeal and filed it early in the morning of September 16 (R. p. 47 and 48). **The above mentioned set of facts are admitted by the Circuit Court as established** (R. p. 48 and 49. See also Exhibits A, B, C and D, R. p. 44 to 48). Upon our filing the appeal before the United States Circuit Court for the First Circuit, the appellees filed a motion for dismissal (R. p. 37), alleging that the appeal had been taken out of the statutory period and that the Circuit Court was without jurisdiction to hear and determine the said appeal. Thereupon, the appellant filed a motion for the correction of the record (R. p. 43) so that it would read on Record, page 29: "Filed September 14, 1940", instead of "September 16, 1940". The United States Circuit Court on the strength of the motion for dismissal, in a **per curiam** opinion dismissed the appeal for lack of jurisdiction (R. p. 48).

II

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

Petitioner respectfully submits that the decision of the Circuit Court of Appeals should be reviewed and the writ of certiorari issued for the following **reasons:**

Because the Circuit Court by holding that notice of appeal in this case was not filed with the District Court on September 14, 1940, and that notice was filed out of time, committed error and violated the following Federal Statute, Federal Civil Procedure Rules, and United States Supreme Court Decisions:

A. **Sect. 1 of the Act of June 22, 1938 (52 Stat. 855, 11 U.S.C.A. 48A)** by not allowing appellant forty day period in which to file notice of appeal.

B. **Federal Rule of Civil Procedure, 6A,** by not computing the last half day of the period which is to be included, Saturday afternoon not being a Sunday, or legal holiday, or half holiday.

C. **Federal Rule of Civil Procedure 73A,** because appellant, within the time prescribed by law, proceeded to file "with the District Court" at the clerk's office the said notice of appeal.

D. **Federal Rule of Civil Procedure 77A,** because although on September 14, 1940 in the afternoon the clerk's office was closed, appellant having proceeded to make proper filing in said office, the District Court should have been deemed open for the said purpose.

E. **Federal Rule of Civil Procedure 77C,** because the clerk's office was closed on the Saturday afternoon of September 14, and it should have been open with the clerk or a deputy in attendance during business hours, said Saturday afternoon not being part of a Sunday, or legal holiday, or a half holiday.

F. **Federal Rule of Civil Procedure 83,** because (1) Copies of old rules of the District Court of Puerto Rico (including Rule 41 of that Court) were never sent to the United States Supreme Court.
(2) Rule 41 of the District Court for Puerto Rico was sustained by the Circuit Court in ousting this appeal when it is in fact contradictory to and inconsistent with the above mentioned Federal Statute and Federal Rules of Civil Procedure.

G. United States Supreme Court decisions, **U.S.** vs. **Lombardo 241 U.S. 73** and **Mutual Life** vs. **Phinney, 178 U.S. 327,** which establish that filing must be performed (a) in time, (b) to the proper officer, and (c) at the clerk's office.

III

IMPORTANCE OF GRANTING THE WRIT

From the above stated reasons, it is evident that this petition involves the important question of the interpretation and construction of the Federal Rules of Civil Procedure above referred to, which should be settled by this Tribunal, including the important question of the interpretation of Rule 83 of the Federal Rules of Civil Procedure, settling the point as to whether or not it is necessary to send to the Supreme Court copies of rules not inconsistent with the Federal Rules and promulgated by the district courts before the Federal Rules of Civil Procedure came into effect.

It involves, too, the essential point of correcting the Circuit Court for having defined and applied the word "filing" contrary to applicable decisions of the Supreme Court of the United States.

Wherefore, your petitioner, referring to the attached brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue a writ of certiorari directed to the United States Circuit Court of Appeals for the First Circuit to certify and send to this Honorable Supreme Court a full and complete transcript of the record herein, to the end that said case may be reviewed and determined by this Honorable Court, as provided by law, and that the decision of the Circuit Court of Appeals may be reversed by the Supreme Court and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem just and proper.

Respectfully submitted,

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Harry Manuel Besosa
Attorneys for the Petitioner.